

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. E-2, SUB 1052  
DOCKET NO. E-7, SUB 1062

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Advance Notice by Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC, of Intent to File Proposed Precedent Agreements with Atlantic Coast Pipeline, LLC, Request to Enter Into Proposed Agreements, and Request for Waiver of Code of Conduct	) ORDER ACCEPTING SECOND AMENDMENT TO AFFILIATE AGREEMENTS, AND DENYING PETITION TO INTERVENE AND OBJECTION AS UNTIMELY

BY THE COMMISSION: On October 29, 2014, in the above-captioned dockets, the Commission issued an Order Accepting Affiliate Agreements, Allowing Payment Thereunder and Granting Limited Waiver of Code of Conduct, pursuant to G.S. 62-153, authorizing Duke Energy Carolinas, LLC (DEC) and Duke Energy Progress, LLC (DEP) to enter into Precedent Agreements and perform certain transactions with Atlantic Coast Pipeline, LLC (ACP or Pipeline). Included in the Precedent Agreements were conditions precedent operating in favor of DEC, DEP and ACP which provided a right of termination under the Precedent Agreements in the event that the Certificate of Public Convenience and Necessity (CPCN) for the Pipeline facilities was not issued by the Federal Energy Regulatory Commission (FERC) on or before June 30, 2017. In addition, the Commission's Order included the following Ordering Paragraph No. 4:

That, for ratemaking purposes, the authorizations to pay compensation provided by this Order do not constitute approval of the amount of compensation paid pursuant to the Agreements, and the authority granted by this Order is without prejudice to the right of any party to take issue in a future proceeding with any provision of the Agreements and with DEC's and DEP's management of their pipeline capacity resources.

On June 21, 2017, DEC and DEP filed a request with the Commission pursuant to G.S. 62-153 for expedited acceptance and approval of a First Amendment to the Precedent Agreements (First Amendment) between DEC, DEP and ACP.

On June 28, 2017, the Commission issued an Order Accepting Amendment to Affiliate Agreements. The Order accepted for filing pursuant to G.S. 62-153 the First Amendment to the Precedent Agreements, and authorized DEC and DEP to operate pursuant to the First Amendment's terms. In addition, the Order included the following

Ordering Paragraph No. 2:

That the authority granted by this Order neither constitutes approval of the amount of any compensation that may be paid under the Precedent Agreements, as amended, nor prejudices the right of any party to take issue with any provision of the Precedent Agreements, as amended, in a future proceeding.

Sierra Club's First Motions

On July 21, 2017, the Sierra Club filed a Petition to Intervene and Motion for Reconsideration in these dockets. In summary, Sierra Club contended that pursuant to G.S. 62-80 the Commission should reconsider its approval of the Precedent Agreements and the First Amendment. In support of its request for reconsideration, Sierra Club discussed two main contentions. First, Sierra Club argued that in seeking expedited approval of the First Amendment, DEC and DEP (collectively, Duke) had failed to comply with Regulatory Condition Nos. 3.1(a), 3.1(c) and 13.2 approved by the Commission in its September 29, 2016 Order Approving Merger Subject to Regulatory Conditions and Code of Conduct, in Docket Nos. E-2, Sub 1095, E-7, Sub 1100, and G-9, Sub 682 (Merger Order). Second, Sierra Club maintained that the projected demand for natural gas for electric generation in Virginia and North Carolina is flat through 2030, and that existing pipeline capacity will be sufficient to meet that demand. Therefore, according to Sierra Club, the construction of the ACP, and the Precedent Agreements that support construction of the ACP, are no longer prudent and in the public interest.

On July 28, 2017, Duke filed a response to Sierra Club's petition to intervene and motion for reconsideration. With respect to Sierra Club's contention that Duke did not comply with the applicable Regulatory Conditions of the Merger Order, Duke discussed each of the three Regulatory Conditions cited by Sierra Club and explained how its actions complied with each condition.

With regard to Sierra Club's second contention, Duke stated that Sierra Club's petition to intervene and motion for reconsideration were untimely, and that Sierra Club presented no changed circumstances or new evidence, as required by G.S. 62-80. In addition, Duke stated that the ultimate relief sought by Sierra Club was the denial of the ACP CPCN, which decision was pending before FERC and is not within the jurisdiction of the Commission.

In an Order issued on September 6, 2017, the Commission denied Sierra Club's petition to intervene, concluding that the petition was not timely filed, and that Sierra Club did not demonstrate that it had the requisite direct interest in the proceeding, as required by G.S. 62-73. In addition, the Commission stated that only a party can move for reconsideration pursuant to G.S. 62-80, and because Sierra Club was denied party status its motion for reconsideration was moot.

## Proposed Second Amendment to Precedent Agreement

On November 7, 2017, Duke filed an Advance Notice and Request for Authorization to Enter into Second Amendment to Precedent Agreement (Advance Notice) pursuant to G.S. 62-153 and the Merger Order Regulatory Conditions. In summary, the Advance Notice states that Duke requests acceptance, approval, and authorization to enter into and operate under a Second Amendment to Precedent Agreement for Firm Transportation Services Atlantic Coast Pipeline between Duke and ACP, and the related amended Service Agreement (Service Agreement) and amended Negotiated Rate Agreement (Negotiated Rate Agreement). The three Agreements are collectively referred to as the Second Amendment. Duke states that pursuant to the procedures set forth in Article V of the Precedent Agreement and as a result of certain route changes, environmental mitigation measures, and similar related matters reflected in the Final Environmental Impact Statement (Final EIS) for the ACP pipeline project (Project) issued by FERC on July 21, 2017, Duke and ACP have recently concluded negotiations on and agreed to the terms of the Second Amendment. A copy of the Second Amendment was attached to the Advance Notice as Exhibit A.

Duke states that the material terms of the Second Amendment impact and modify the terms of the Precedent Agreement, as well as the terms of the Service Agreement and the Negotiated Rate Agreement. Duke attached to the Advance Notice, as Exhibits B and C, red-lined copies of the amended Service Agreement and amended Negotiated Rate Agreement reflecting the changes set forth in the Second Amendment. Duke states that it considers the material terms of the Second Amendment, as well as the amended Service Agreement and amended Negotiated Rate Agreement, to be confidential and proprietary trade secrets of Duke, and, therefore, Duke filed them under seal, pursuant to G.S. 132-1.2.

Duke states that the Second Amendment includes modifications to the Service Agreement which are based on the CPCN issued by FERC for the Project,<sup>1</sup> which rejected ACP's proposed pack and draft service for Anchor and Foundation shippers as unduly discriminatory. Further, Duke states that it is notifying the Commission that the Second Amendment will, ultimately, be filed with the FERC by ACP when the construction of the Project is complete, and shortly before commencement of service. Duke states that such filing is pursuant to FERC's standing requirement to file the terms of negotiated rate agreements and non-conforming service agreements with the FERC.<sup>2</sup>

Duke further states that it has reviewed Regulatory Condition 3.1(c), approved by the Commission in the Merger Order, and does not believe that the prospective filing with FERC of the Negotiated Rate Agreement or the Service Agreement falls within the intended parameters of this Regulatory Condition. Duke opines that the Second

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<sup>1</sup> Atlantic Coast Pipeline, LLC, Dominion Energy Transmission, Inc., and Duke Natural Gas Company, Inc., 161 FERC ¶ 61,042 (October 13, 2017) (Certificate Order).

<sup>2</sup> As noted in the Certificate Order, the Service Agreements for Foundation and Anchor Shippers for the ACP project contain a number of permitted non-conforming terms in comparison to the standard form of service agreement included in ACP's tariff.

Amendment does not threaten or otherwise impact the jurisdiction of the Commission in any way, and could not be used to invoke federal preemption of the Commission's jurisdiction. Rather, according to Duke, the filing of the Second Amendment by ACP is an administrative matter designed to provide notice of the terms of any negotiated rate agreements or non-conforming service agreements related to service on the Pipeline, both of which are matters within the proper jurisdiction of the FERC. Nevertheless, and notwithstanding Duke's conclusion, Duke states that it decided to provide the Advance Notice pursuant to Regulatory Condition 3.1(c).

Duke requests that the Commission grant it the authorization to enter into and operate under the Second Amendment at the Commission's earliest convenience in order to facilitate the timely commencement of construction of the Project, and in order to comply with the authorization deadline set forth in Section V.E.2. of the Precedent Agreement. Moreover, Duke states that ACP cannot begin construction of the Project until ACP receives signed Service Agreements, and that a significant delay in beginning construction would likely lead to increased costs.

In addition, Duke submits that the Second Amendment is in the public interest and otherwise necessary and appropriate in order to allow the Project to move forward in light of the route changes, environmental mitigation measures and other related matters required by the Final EIS and Certificate Order for the Project. Duke notes that ACP has indicated that it will not move forward with the Project without the modifications reflected in the Second Amendment, and that the modifications were the subject of several months of arms-length negotiations between ACP, Duke, and other customers, following due diligence, review, and analysis of ACP's claims for modification of the Precedent Agreement. In addition, Duke states that the solutions set forth in the Second Amendment reflect a reasonable and balanced resolution of multiple claims raised by ACP. Duke further opines that the resolution of these claims maintains ACP as the best cost/least cost provider of the additional interstate pipeline natural gas transportation capacity needed by Duke in order to continue to provide safe and reliable service to its North Carolina customers from new and diversified sources of supply in the Marcellus and Utica shale formations.

Moreover, Duke submits that the underlying rationale for acquiring ACP capacity, as discussed in Duke's initial filings in this docket, continues to pertain and support such acquisition. Duke states that based on ACP's FERC Certificate Order and Final EIS, Duke is not aware of any other sources of capacity readily available to serve Duke within the timeframe needed to permanently address demand growth on Duke's system. In addition, Duke states that based on the results of the initial RFP in this docket, Duke has no reason to believe that such capacity, even if it existed, would be less expensive than ACP capacity. Further, Duke states that receipt of gas from ACP will provide critical system support (supply and pressure) to Duke in eastern North Carolina, and is necessary to provide support for existing and future demand on the Duke system.

Finally, Duke notes that pursuant to Regulatory Condition 3.1(a) of the Merger Order, Duke provided the Second Amendment, and the amended Service Agreement

and amended Negotiated Rate Agreement, to the Public Staff for review prior to filing them with the Commission, and it requests that the Commission authorize it to enter into the Second Amendment, revised Service Agreement, and revised Negotiated Rate Agreement and to operate thereunder, pursuant to G.S. 62-153(b).

### Sierra Club's Second Motions

On December 6, 2017, Sierra Club filed a second Petition to Intervene in these dockets, and an Objection to Second Amendments to Precedent Agreement. With regard to its Petition to Intervene, Sierra Club noted correctly that Regulatory Condition 13.2(c), which was not applicable to Duke's First Amendment filing, is applicable to Duke's Second Amendment filing, and allows other interested persons to petition to intervene regarding the proposed Second Amendment. With respect to its objection to the Second Amendment, Sierra Club essentially repeats the grounds that it asserted in its previous motion for reconsideration. In summary, Sierra Club contends that the projected demand for natural gas for electric generation in the region that includes Virginia and North Carolina is flat through 2030. In addition, Sierra Club maintains that load forecasts for the utilities who would be served by the ACP have declined since 2014, and that existing pipeline capacity will be sufficient to meet that demand. Moreover, Sierra Club states that much of the future need for gas-fired electric generation could be obviated or delayed by energy efficiency and demand-side management. Therefore, according to Sierra Club, the construction of the ACP and the Precedent Agreements that support construction of the ACP are no longer prudent and in the public interest.

In addition, Sierra Club notes that the Commission and other intervenors filed a Request for Rehearing in the FERC ACP CPCN docket, and that the Commission's request is based on the 14% recourse rate approved by FERC. Sierra Club opines that this is a basis for the Commission to hold the present docket in abeyance until FERC rules on the rehearing request of the Commission and other intervenors in the ACP CPCN proceeding.

Finally, Sierra Club states:

[N]ow is the time for the Commission to take a hard look at the precedent agreements and determine whether they are in the public interest.

Objection to Second Amendments, at 17.

On December 6, 2017, Duke filed a Reply to Sierra Club's Petition to Intervene and Objection to Second Amendments (collectively, Objection). In summary, Duke states that the Commission correctly rejected Sierra Club's first attempt to intervene for purposes of advocating analyses and remedies that are beyond the proper scope of this docket, and in large part beyond the Commission's jurisdiction, and that the Commission should do the same with regard to Sierra Club's second attempt to

intervene and raise the same issues. Further, Duke contends that the scope of the Commission's review in this docket is to determine whether the Second Amendment violates G.S. 62-153 by being "made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility," and whether the affiliate agreements are just and reasonable on their face. Duke opines that Sierra Club has failed to address the pertinent issues under G.S. 62-153, and, instead, has raised issues that are within the exclusive jurisdiction of FERC. Moreover, Duke notes that Sierra Club's Objection was not filed within the 15-day time period required by Regulatory Condition 13.2(e). In addition, Duke notes that the Commission's pending rehearing request at FERC challenges the allowed rate of return on common equity component in the ACP's recourse rates, and that FERC's allowance or disallowance of this request will have no impact on the rates or terms or conditions of service applicable to Duke under the Precedent Agreement. Duke further opines that it will have no impact on whether the Project is constructed because the Commission's rehearing request does not challenge FERC's certification of the Project. Therefore, according to Duke there is no rational relationship between the Commission's rehearing request at FERC and the Sierra Club's objection, and no basis to delay a decision in the present docket.

#### Public Staff's Response

On December 18, 2017, the Public Staff presented this matter to the Commission at the Commission's Regular Staff Conference. The Public Staff stated that it regretted that it did not file a response to the Advance Notice by November 22, 2017, the due date required under Regulatory Condition 13.2(e). The Public Staff asserted that no party was harmed by its deviation from the procedure prescribed by the Regulatory Conditions, particularly given the additional requirements of G.S. 62-153(b). The Public Staff further stated that it reviewed the Advance Notice and, based upon the facts set forth therein, it believes that the filing of the Second Amendment should not adversely affect the Commission's jurisdiction. In addition, the Public Staff opined that because no party filed an objection by the November 22, 2017 deadline it believes that the advance notice part of Duke's November 7, 2017 filing can be considered to be closed.

With respect to G.S. 62-153(b) and Duke's request for approval, the Public Staff stated that it believes that the Regulatory Conditions and the Code of Conduct approved in the Merger Order ensure that costs are assigned or allocated properly and that ratepayers are otherwise protected. The Public Staff recommended that the Commission accept for filing the Second Amendment, and authorize Duke to enter into the Second Amendment and make payments pursuant thereto, subject to the conditions approved in the Merger Order. The Public Staff further recommended that the Commission's Order state that for ratemaking purposes the authority granted therein neither constitutes approval of the amount of any compensation paid thereunder nor prejudices the right of any party to take issue with any provision of the Precedent Agreement, as amended, in a future proceeding. Finally, the Public Staff recommended that the Order state that the Commission may subsequently disapprove, after hearing, the Precedent Agreement, as amended, or any fees, commissions or compensation whatsoever paid to any affiliated or subsidiary holding, managing, operating,

constructing, engineering, financing or purchasing company or agency for services rendered if found to be unjust or unreasonable, or made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility.

### Discussion and Conclusions

Pursuant to Regulatory Condition 13.2(e), interested parties can file a response or objection to an Advance Notice “within 15 days before the notice period expires.” Pursuant to Regulatory Condition 3.1(c)(i), the notice period for Piedmont’s proposed Second Amendment was 30 days. Piedmont filed its Advance Notice on November 7, 2017. Thus, the last day of the notice period was December 7, 2017, and 15 days before the end of the notice period was November 22, 2017. Sierra Club filed its Petition to Intervene and Objection on December 6, 2017. Thus, Sierra Club did not make its filings in a timely manner. As a result, the Commission finds and concludes that Sierra Club’s Petition to Intervene and Objection should be denied.

Based on the foregoing and the record, the Commission further finds and concludes that the Second Amendment proposed by Duke has been properly filed with the Commission pursuant to G.S. 62-153 and the Regulatory Conditions of the Merger Order, and that it is in the public interest to accept the Second Amendment for filing and to authorize Duke to operate consistent with the Second Amendment’s terms. In addition, the Commission finds and concludes that this authority should be conditioned on preserving the right of all parties in a future proceeding to take issue with any provision of the Precedent Agreement, Service Agreement and Negotiated Rate Agreement, as amended.

IT IS, THEREFORE, ORDERED as follows:

1. That the petition to intervene and objection filed by Sierra Club shall be, and are hereby, denied.
2. That the Second Amendment filed by Duke is hereby accepted for filing pursuant to G.S. 62-153, and Duke is hereby authorized to operate pursuant to the Second Amendment’s terms.
3. That the authority granted by this Order neither constitutes approval of the amount of any compensation that may be paid under the Precedent Agreement, Service Agreement or Negotiated Rate Agreement, as amended, nor prejudices the right of any party to take issue with any provision of those Agreements, as amended, in a future proceeding.

4. That, notwithstanding the authority granted herein, the Commission may subsequently disapprove, after hearing, the Precedent Agreement, Service Agreement or Negotiated Rate Agreement, as amended, or any fees, commissions or compensation whatsoever paid to any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency for services rendered, if found to be unjust or unreasonable, or made for the purpose or with the effect of concealing, transferring or dissipating the earnings of a public utility.

ISSUED BY ORDER OF THE COMMISSION.

This the 19th day of December, 2017.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script, appearing to read "Linnetta Threatt".

Linnetta Threatt, Deputy Clerk